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14 FEB 2013

# Kirkcaldy Sheriff Court and Justice of the Peace Court



Sheriffdom of Tayside, Central and Fife  
Sheriff Clerk's Office  
Sheriff Court House  
Whytescauseway  
KIRKCALDY  
Fife KY1 1XQ

MR

**Scottish Legal Aid Board**  
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Your reference: SM/08/2640437712  
RSB/account /offer 2120276/7

Our Reference AN  
Direct Dial: 01592 - 208940

Date 13 February 2013

Dear Haggerty

## Legal Aid account- Note of Objection

I write in relation to the above and to the Hearing on the Note of Objection which took place in this Court on the 15 January 2013 before Sheriff McCulloch.

Sheriff McCulloch has now issued his decision in this matter today, and sustained the Legal Aid board's objection. I enclose a copy of his note for your perusal and interest.

In his decision the Sheriff has remitted the matter back to me to amend my report and this I have done, and now find that the amount due to be paid by the legal aid board is £127.65 plus VAT. for Rollo Davidson McFarlane, and £182.25 plus VAT for Jackson and Co.

Yours sincerely

Alan Nicol  
Auditor of Court

**SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY**

NOTE

by

**SHERIFF AG McCULLOCH**

in respect of Note of Objections by the  
Scottish Legal Aid Board

to

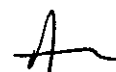
the decision of the Auditor of Court,  
Kirkcaldy in the case of

**PF KIRKCALDY v MANDY ROSS**

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On 15 January 2013 the auditor of court taxed the account submitted to the Scottish Legal Aid Board in respect of the accused Mandy Ross in the sum of £642.00 plus VAT. This decision followed upon a taxation on 9 January, where Mr Jackson, solicitor appeared on his own account (and that of Messrs Rollo Davidson McFarlane, previously instructed) and Mr Haggerty of the Scottish Legal Aid Board also appeared.

The issue for consideration by the auditor was the interpretation placed by on the one hand the Legal Aid Board, and on the other hand the agents, of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, particularly 4(5B). For assistance these regulations are currently printed in volume 3 of the Parliament House Book, at page G847/8. Regulation 4(5B) is in the following terms:



“The amount payable under (as the case may be) paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1a is half the amount that would otherwise be payable if the assisted person –

- (a) was represented by a solicitor arranged by the Board to provide criminal legal aid pursuant to regulation 7(1) of the Criminal Legal Aid Assistance (Duty Solicitors) (Scotland) Regulations 2011 at the first diet which the assisted person was called upon to plead;
- (b) tendered a plea of not guilty at that diet; and
- (c) before the commencement of the trial tendered a plea of guilty.”

The circumstances of the instant case are that Miss Ross was charged with two offences on a summary complaint, namely assault and theft. She first appeared at Kirkcaldy Sheriff Court on 1 December 2011, from custody, was represented by the duty solicitor, and pled not guilty to both charges. An intermediate diet was fixed for 7 March 2012, with a trial fixed for 2 April 2012. When the case called on 7 March it was continued to 21 March on defence motion. Miss Ross did not appear in court on 21 March and a warrant for her arrest was issued. On 26 April she appeared on the warrant and new diets were fixed for 8 August and 3 September 2012. On 8 August Miss Ross again did not appear and a further warrant for her apprehension was issued. On 26 September she appeared from custody to answer the warrant and adhered to the plea of not guilty. Although bail was sought, she was remanded for trial, with an intermediate diet of 17 October 2012.

At the intermediate diet on 17 October Miss Ross pled guilty to the charge of theft (of a purse) and adhered to the plea of not guilty to the assault. These pleas were accepted by the procurator fiscal. The court deferred sentence for background reports and bail was granted, and on 13 November Miss Ross was given a community payback order.



During the conduct of the case, in about May 2012, legal aid was transferred from Mrs Miller of Rollo Davidson McFarlane, to Mr Jackson of Jackson & Company. On completion of the case, Mr Jackson submitted an account to the Legal Aid Board. He charged the fixed fee envisaged by the regulations previously referred to. This was a fee, including a deferred sentence fee, of £540.00, excluding VAT, and travelling expenses of £36.00, making a total of £576.00, to which VAT would fall to be added. In such situations where there has been a transfer of agency, the Board deal with the one account, and then make offers to the separate agents. In this case the Board decided that regulation 4(5B) applied, and reduced the core fee to one half. That resulted in significantly reduced offers being made to agents, which they rejected and insisted upon the taxation.

At the taxation, submissions were made by both sides, and the decision of the auditor of court at Dumbarton on a similar point was considered. I was advised that that auditor found against the Board, and awarded the full fee to agents. The Board lodged a note of objections and the matter went to the sheriff, who refused the note.

Before the auditor, and according to his note, Mr Haggerty for the Board conceded that cases of this type (where there was a mixed plea outcome) were not strictly covered in the rules, and he did understand that this matter was being looked at by the Board. However the fact remained that there was a guilty plea made (to one of the charges) before the commencement of any trial. Indeed there was no trial. He drew to the auditor's attention the executive note issued with the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011. That executive note sets out a number of policy objectives. Whether or not the regulations achieve the policy objectives is not for me to say. However the 6<sup>th</sup> objective:



“is to reduce by half the new prescribed fees in Schedule 1 and 1A of the principle regulations in the following circumstances; where the accused person appears from custody, is represented by the duty solicitor (whether or not the case is subsequently taken forward by the duty solicitor), a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial. Where a trial goes ahead the full fees will be payable. The aim is to deliver the required savings by reducing the very significant discrepancy between the level of fees paid for a guilty and a not guilty plea for solicitors operating under the duty scheme and to ensure that the appropriate plea is made at the earliest possible stage in the proceedings on the basis of the best possible advice from the solicitor.”

It goes on to recognise that the duty solicitor scheme can provide new business to solicitors, to point out that the solicitor can attend the court personally and deal with the case from custody, and that this amendment does not affect the fees relating to ABWOR where a plea of guilty has been tendered. Finally the policy objective was said to deliver approximately £900,000 worth of savings to the legal aid fund in 2011 – 12 and approximately £1.6 million for a full year.

It seems to me therefore that the purpose behind the amendment of the regulations was nothing simpler than cost savings to the tax payer.

Before me, Mr Haggerty argued that it was a very simple matter. Miss Ross had been represented by the duty solicitor, a plea of not guilty had been entered at the first hearing, and subsequently a plea of guilty had been entered before the trial commenced. The case fell within the regulations and it mattered not that a not guilty plea had been accepted, it mattered not that there had been negotiations to bring matters to a conclusion, it mattered not that there had been sundry other procedure (occasioned by the accused’s failure to appear) and it mattered not that there might be a perceived unfairness in only paying one half the fee. He accepted that there might be anomalies. He referred to the case of *Buchanan v McLean* (2001SCCR475) where a challenge to fixed fees had been mounted, but rejected. There can be



winners and losers in every situation, it was suggested. He also referred to Bennion *Interpretive Presumptions (General) Part XV111* where at section 285 it was stated under the heading "Presumption that literal meaning to be followed" ... "*Prima facie* the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning." There are a number of cases which have followed such a presumption. Parliament is taken to mean what it says.

In the present instance, in my view, there is no ambiguity. However Mrs Miller, for the accused, argued that such an approach was inherently unfair. At the taxation the Board had asked the auditor to look behind the regulations, and use the executive note as a guide to interpretation. Now the Board was saying that the regulations should just be given their literal meaning. It would not be fair to have such a restricted interpretation, particularly given that the regulation does not appear to cover the situation in hand, namely where there was a mixed plea. There is no reference in the regulation to what happens if there is an acceptance of a not guilty plea. I would answer that point by saying that if there was an acceptance of a not guilty plea to all the charges, then regulation 4(5B) would apply, and the full fee would be paid. It was also pointed out that a considerable amount of work was done in this case, partly due to the accused's failures to attend, but also through negotiations with the fiscal, and preparing a plea for an accused then remanded.

But there are other situations in which it would provide an unfairness for a literal interpretation. Image the situation of three charges on a complaint, say a contravention of section 49 (carrying a knife), a police assault, and the possession of a very small amount of cannabis. It may be that the accused person could accept at an



early stage that he was indeed carrying a very small amount of cannabis and a guilty plea lodged to that charge only, in the circumstances envisaged by the regulations, at an intermediate diet. The case then proceeded to trial, but before the commencement of the trial the Crown, having discussed matters with witnesses, decided not to proceed on the two much more serious charges. On a literal interpretation of the regulations, it seems to me that the Board would be entitled only to pay one half of the fee. That is clearly unfair, but, unfortunately for agents, unfairness had very little to do with the matter. I was advised by Mr Haggerty that the Board was not proceeding on that basis, and a case that went to trial, where a guilty plea had been recorded to one charge, would still receive the full fee. Another unusual factor is that the courts generally, and the Government, are encouraging as early a plea as possible. It would appear that this regulation, given its interpretation, may in the future hinder early pleas. The moral argument is with the agents; the literal interpretation is with the Board.

I feel that I am constrained by the words of the regulations, unfair though they are. I am therefore unable to support the decision of the auditor. As I am sustaining the note of objections, I must remit to the auditor to amend his report, so as to allow only the fee as originally offered by the Legal Aid Board. Given the subject matter of the discussion, I do not consider that there should be any award of expenses in respect of the proceedings before the auditor, or in respect of the note of objections.

*Act minor*

13 FEBRUARY 2013

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## POINTS OF OBJECTION

**Assisted Persons Name** : [REDACTED]  
**ABWOR Reference** : SM/08/2640437712  
**Solicitors Name** : Charles Jackson & Co

**Date of Taxation & Location:** Auditor Kirkcaldy Sheriff Court 9 January 2013 @ 10:00am

**Type of Case :** Summary Criminal

### 1. Nature of the case:

The solicitors applied for and were granted summary criminal legal aid to represent the accused in respect of charges of assault and theft.

### 2. Fees allowable to solicitors

Solicitors are entitled to payment in terms of The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 also applies to Fixed Payments where there is no conflict. It is those regulations which provides for taxation in terms of Regulation 11(1)(c) "If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in-

(c) the sheriff or district court, the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place".

### 3. Nature of dispute:

**NOTE: THIS IS ALMOST IDENTICAL IN ITS FEATURES TO THE CASE OF P.F v FRASER NISH WHICH THE BOARD LOST AT TAXATION IN DUMBARTON SHERIFF COURT AND WERE ALSO UNSUCCESSFUL ON SUBSEQUENT NOTE OF OBJECTIONS BEFORE THE SHERIFF.**

In this case the duty solicitor initially tendered a plea of not guilty on the accused's behalf. A grant of summary criminal legal aid was then granted originally to Rollo Davidson McFarlane solicitor and subsequently transferred to Jackson & Co who took the case through to its natural conclusion.

On the 13 November 2012 and before the start of trial the accused's plea of "not guilty" to charge 1 (assault) was accepted and he then tendered a plea of guilty to charge 2 (theft) and was sentenced to a community payback order. In effect a "mixed plea" bargain has disposed of this case before the start of trial and the accused has changed his plea to guilty (albeit to only one of the charges) before the start of trial.

The solicitors accept that the core fee requires to be split on a pro-rata basis. The only dispute relates to whether this is a case which is caught by The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011, in particular, Regulation 5



of these regulations which amends the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, by inserting a "new" Regulation 4(5B) which reads as follows:-

*"(5B) The amount payable under (as the case may be) paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1A is half the amount that would otherwise be payable if the assisted person--*

- (a) was represented by a solicitor arranged by the Board to provide criminal legal aid pursuant to regulation 7(1) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 at the first diet at which the assisted person was called upon to plead;*
- (b) tendered a plea of not guilty at that diet; and*
- (c) before the commencement of the trial tendered a plea of guilty."*

The Executive Note which accompanies these Regulations explains the purpose of this regulation.

*"The sixth policy objective is to reduce by half the new prescribed fees in Schedule 1 and 1A of the principal Regulations in the following circumstance: where the accused person appears from custody, is represented by the duty solicitor (whether or not the case is subsequently taken forward by the duty solicitor), a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial. Where a trial goes ahead, the full fees will be payable. The aim is to deliver the required savings by reducing the very significant discrepancy between the levels of fees paid for a guilty and not guilty plea for solicitors operating under the duty scheme and to ensure that the appropriate plea is made at the earliest possible stage in the proceedings on the basis of the best possible advice from the solicitor. This also recognises that the duty scheme can, in some cases, provide new business to solicitors. It is of course always within the gift of the solicitor who will be acting for an accused person to attend the court personally. This amendment does not affect the fees set out in Schedule 1B which relate to ABWOR, where a plea of guilty has been tendered. Regulation 5 gives effect to this policy objective."*

#### Board's Position

As per both the Regulation and the Executive Note we believe that only a ½ case disposal fee is payable as the terms of Regulation 4(5B) have been met. To confirm:-

- (a) was the accused represented by the duty solicitor = YES.
- (b) Was a plea of not guilty tendered at that diet = YES.
- (c) Before the commencement of trial did the accused tender a plea of guilty = YES (albeit not on all charges)

The taxation will be on the reduction of the ½ core fee only.

The agent has been paid ½ of the ½ core fee given there has been a transfer plus a £25.00 SER disposal fee. That is £146.25 (£485 x 25% + £25.00)

#### Solicitor's Position

Neither the outgoing or incoming agent accept that the reduced core fee should apply here. However, it is the 2<sup>nd</sup> agent who is taking the matter to taxation.

The 1<sup>st</sup> agent (Rollo Davidson McFarlane) have challenged the abatement in line with the decision of the sheriff in Dumbarton Sheriff Court.

The 2<sup>nd</sup> agent (Jackson & Company) does not actually mention that decision. Their position is that a plea of guilty did not dispose of this case it was a mixed plea and for the most serious charge of assault a not guilty plea was accepted.

It should be noted that a reference to having to plead guilty "to all of the charges" only features where "the solicitor represents an accused person in the same court on the same day on more than one complaint and pleads guilty to all of the charges" (Regulation 4 (5A) not Regulation 4 (5B)).

#### **4. Mailshot Guidance Issued by the Board to the Profession**

In terms of the mailshot which we issued to the profession "Criminal Legal Assistance Update - 17 March 2011" is as follows:-

*This mailshot provides details of important fee changes arising from the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011.*

*The regulations follow the tripartite discussions between the Scottish Government, the Law Society of Scotland and the Scottish Legal Aid Board, to identify savings as a result of the £1.3 billion cut in the Scottish Government budget next year.*

#### **3. Reduced fee where the duty solicitor tenders a not guilty plea and the accused person subsequently pleads guilty before the trial begins**

*Regulation 5 further provides for the fixed payment payable to a solicitor under paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1A (summary criminal legal aid) to the Fixed Payment Regulations to be halved if the duty solicitor tenders a not guilty plea on the person's behalf and the person subsequently obtains a grant of summary criminal legal aid (whether with the duty solicitor or any other solicitor acting as nominated solicitor) and pleads guilty before the trial begins, a half core fee will be payable.*

*Regulation 5B reads as follows.*

*"(5B) The amount payable under (as the case may be) paragraph 1 of Part 1 of Schedule 1 or paragraph 1 of Schedule 1A is half the amount that would otherwise be payable if the assisted person—*

*(a) was represented by a solicitor arranged by the Board to provide criminal legal aid pursuant to regulation 7(1) of the Criminal Legal Assistance (Duty Solicitors)(Scotland) Regulations 2011 at the first diet at which the assisted person was called upon to plead;*

*(b) tendered a plea of not guilty at that diet; and*

*(c) before the commencement of the trial tendered a plea of guilty."*

*The core fixed payment will be halved before any enhanced payment under regulation 4(6) where the assisted person has been remanded in custody and is under 21 years of age at any time during that remand.*

*This amendment does not affect fixed payments under Schedule 1A where the trial actually commences but does not exceed 30 minutes duration. In these situations the solicitor is still entitled to the relevant unrestricted case disposal fee payable for that court even though the first day trial fee is not chargeable.*

*The provision only affects proceedings commenced on or after 22 March and not applications arising from an earlier plea of not guilty.*

#### **5. Similar Taxations**

As mentioned above the Board has already lost an almost identical point in Dumbarton Sheriff Court on a Note of Objections. See Auditor's Decision of 27 June 2012.

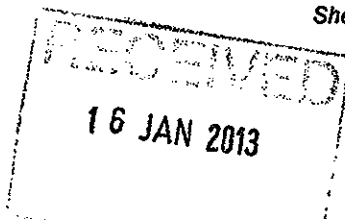
# Kirkcaldy Sheriff Court and Justice of the Peace Court



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[REDACTED]  
**Scottish Legal Aid Board**  
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**Edinburgh 30**



Your reference: SM/08/2640437712  
RSB/ account/offer/2120276/7

Our Reference AN  
Direct Dial: 01592 - 208940

Date 15 January 2013

[REDACTED]  
[REDACTED] – Legal Aid account

I write in relation to the above and to the diet of taxation which took place on the 9 January 2013.

I now enclose a copy of the note of my decision and I have intimated this to the 2 other solicitors involved in this case.

Please note that you have 7 days from this date to lodge objection to the Sheriff in this matter if so advised.

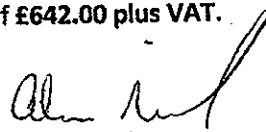
Yours sincerely

Alan Nicol  
Auditor of Court

[www.scotcourts.gov.uk](http://www.scotcourts.gov.uk)

The Scottish Court Service is responsible for the administration of Scottish Courts and the Office of the Public Guardian

Kirkcaldy 15 January 2013. The Auditor of Court taxes the account submitted to the Scottish Legal Aid Board in respect of the accused [REDACTED] in the sum of £642.00 plus VAT.



Alan Nicol

Auditor of Court

At this taxation, which took place on 9 January 2013, Mr Jackson of Messrs Jackson & Co, Solicitors, Leven, represented the interests of his application and that of Mrs Gemma Miller, Messrs Rollo Davidson McFarlane, Solicitors, and Cupar. Both of these solicitors had been involved in the case with Mrs Miller appearing as duty agent when the case originally called, and tendering pleas of not guilty. Further on in proceedings the responsibility of the case was transferred to Mr Jackson, as I understood that [REDACTED] to be an existing client of his firm. The Scottish Legal Aid Board were represented by [REDACTED]

The taxation was required as the account submitted by both agents in this case was disputed by the Scottish legal Board, and in these circumstances I was requested by the solicitors to fix a diet of taxation.

#### **Procedural History of case**

[REDACTED] was charged with 2 offences on summary complaint-Assault and Theft. She first appeared at Kirkcaldy Sheriff Court on the 1 December 2011 and pled not guilty to both charges and trial and intermediate diet was fixed for 2 April 2012 and 7 March 2012 respectively. When the case called on the 7 March it was continued to the 21 March on Defence motion. [REDACTED] did not appear in Court on the 21 March and warrant for her arrest was issued. On the 26 April [REDACTED] appeared on the warrant and new trial and intermediate diets were fixed of 3 September and 8 August 2012.

On the 8 August [REDACTED] did not appear and a further warrant for her apprehension was issued. On the 26 September she appeared in custody to answer the warrant and adhered to the plea of not guilty. Bail was asked for and opposed by the Crown and the Sheriff remanded her in custody for trial on the **30 October 2012** and intermediate diet of **17 October 2012**.

**On the 17 October Mandy Ross pled guilty to the second charge (theft of a purse) and adhered to the plea of not guilty Assault, which pleas were accepted by the Prosecutor.**

The court deferred the matter until 13 November 2012 to obtain full background reports and granted bail. On the 13 November Ms Ross was given an 18 Month Community Payback order.

During the conduct of the case, around May 2012, the legal aid responsibility was transferred between the 2 agents previously mentioned.

### **Legislation on Payment of accounts**

The legislation in dealing with this matter is contained in the following –

**The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 and**

**The Criminal Legal Aid (fixed payments) (Scotland) Amendment Regulations 2011**-which came into force on the 22 March 2011.

It is in the second of these 2 pieces of legislation that I was primarily directed to by both parties to Regulation 5(B) which states –

5B-The amount payable under (as the case may be) paragraph 1 of Schedule 1 or paragraph 1 of Schedule 1A is **half the amount** that would otherwise be payable if the assisted person-

- a) Was represented by a solicitor arranged by the Board to provide criminal legal aid pursuant to regulation 7(1) of the Criminal legal Assistance ( Duty Solicitors) Scotland Regulations 2011 at the first diet at which the assisted person was called on to plead ;
- b) Tendered a plea of not guilty at that diet;
- c) **Before commencement of the trial tendered a plea of guilty.**

### **Legal aid account- process**

The accounts for each of the solicitors have been submitted to the Scottish Legal Aid Board and in each case the Board has rejected the claims for payments and offered half of the amount on the basis of their interpretation of the rule regulation 5(B) referred to above.

Each of the solicitors have disputed the Board's interpretation and asked for a taxation to be heard on this matter, as they are of the view full amounts as submitted for payment ought to be paid.

### **Objections and Submissions**

At the diet of taxation I heard submissions for either side, and in respect of the Board I was presented with a full Note of Objections. I do not propose to narrate the full Note but would summarize their position and [REDACTED] decision as follows-

The board were of the view that this case meets the situation envisaged by the legislation as amended in March 2011, namely it is a plea of guilty before the trial commences, albeit not on all charges (mixed plea). A half of the core fee is applicable charge.

[REDACTED] conceded that these types of cases (mixed plea outcomes) were not strictly covered in the rules, and he understood that this was being looked at again by the board. However, he did think

on balance that it was still a guilty plea in this case, and payment of half the core fee was in spirit of what the legislators had intended in reducing the legal aid bill in Scotland. In support of this he referred to the Executive Note issued with Criminal Legal Aid (fixed payments) Scotland Amendment regulations 2011. In the sixth policy objective narrated in this paper it describes once again the policy of half fees for guilty pleas and the proposed savings. [REDACTED] stated that this Executive Note was issued to the profession in March 2011. [REDACTED] also very fairly brought to my attention a decision on an almost an identical point in Dumbarton Sheriff Court. Again, in this case taxation had been held and after the Auditor had ruled against the board on the matter they proceed to lodge a formal objection to the Sheriff, who refused the objection and agreed with the Auditor's decision.

For the solicitors' involved I was advised the Rollo Davidson McFarlane challenged the proposed abatement of the core fee in line with decision taken by the Sheriff at Dumbarton and content also to follow Mr Jackson's submissions.

Mr Jackson in his submission stated that he too would refer to the Dumbarton decision, and in particular the comments made by the auditor in his note regarding a full plea of not guilty to both charges being accepted would have resulted in a full fee being payable. In this present case of his client Mr Jackson stated that the most serious charge was the Assault, and his discussions with the Procurator Fiscal resulted in a not guilty plea being accepted, with a guilty plea to the lesser charge.

He felt justified in seeking the core fee without any abatement, as in his view he felt that the work put in to resolving the case merited this.

### **Conclusion**

This case fully illustrates the difficulty arising over how 'mixed pleas' are dealt with by the legal aid Board, and how regulation-5(B) is interpreted by the board and practitioner's alike. I also explained to parties I shared the same difficulty.

However ultimately I have had to make a decision on this case, and in reaching the decision I have very narrowly come to the conclusion that I agree with Mr Jackson's argument that the full fee be paid on this occasion, supported by the Dumbarton Sheriff Court decision.

Accordingly I tax the account in the sum of **£642 (including account fee £36 and audit fee of £30)** and excluding VAT.

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

NOTE OF OBJECTIONS

in the case of

PF (KIRKCALDY) -v- 

arising from

A decision of the Auditor at taxation on  
9 January 2013

The Scottish Legal Aid Board (the Board) objects to the Report by the Auditor of Court, Kirkcaldy Sheriff Court, dated 15 January 2013, in relation to the fees claimed by Mr Jackson, Messrs Jackson & Co, Solicitors, Leven and, by extension, Mrs Gemma Millar, Messrs Rollo Davidson McFarlane, Solicitors, Cupar (the case having been subject to a transfer and, therefore, the case disposal fee divided between the solicitors representing the accused person).

For ease of reference a copy of the Report and a copy of the Points of Objection, and supporting documentation, lodged by the Board are attached to this Note. The Board objects for the following reasons.

1. In reaching his decision, it is respectfully submitted that the Auditor misdirected himself in law in concluding, albeit narrowly, that regulation 4(5B)(c) could not apply in the circumstances of the case as the accused had pled guilty to only one of the charges, and that the nominated solicitor was, therefore, entitled to the full fee.

It is submitted that regulation 4(5B) does not require that a plea of guilty is tendered to all the charges on a complaint, only that "before the commencement of the trial [the assisted person] tendered a plea of guilty", this part of the provision being highlighted in the Auditor's report. In this regard, it was stated by the Board that, a plea of not guilty to the other charge having been accepted by the Crown, the accused person did plead guilty to the remaining charge thus satisfying the terms of the provision. The case was thereby disposed of and did not proceed to trial.

2. In his Report, the Auditor makes reference to Mr Jackson's submission adopting the terms of the "Dumbarton decision", and in particular the comments made by the Dumbarton Auditor in his note regarding a full plea of not guilty to both charges being accepted resulting in a full fee being payable.

To the extent that the Auditor took the Dumbarton Auditor's reasoning into account, it is respectfully submitted that the Auditor took into account irrelevant information *et separatim* arrived at a view that no Auditor, properly directed, could have reached in arriving at his decision. Firstly, it is submitted that such information is irrelevant in arriving at a decision which should be based on what the Auditor considered to be a proper interpretation of the relevant provision, which, from the conclusion of the report, we believe the Auditor did. Secondly, it assumes, wrongly in the Board's view, a *nexus* between the application of



regulation 4(5B) and the amount of work undertaken by the solicitors, and thirdly, it assumes as a given that there would be more work in negotiating a plea whereby the Crown accepts a plea of not guilty to one charge and a plea in mitigation is made, against the amount of work in persuading the Crown to accept a plea of not guilty to both charges (in this case) thereby disposing of the proceedings.

3. Lastly, the Auditor, in arriving at a purposive interpretation, may have failed to have sufficient regard to the terms of regulation 4(5B) and the terms of the Executive Note relating to this provision (set out in the attached Points of Objection) explaining the purpose of the sixth policy objective.

The penultimate sentence of the narrative in the Executive Note, states "*This amendment does not affect the fees set out in Schedule 1B which relate to ABWOR, where a plea of guilty has been tendered*".

Regulation 6(1)(ba) of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 [2003 No. 179] makes provision for ABWOR to be provided "at any diet to which the case has been adjourned under section 145 of the 1995 Act". This refers to continuation without plea procedure where ABWOR is available to an accused person who is not in custody. Similarly an appointed solicitor providing ABWOR under regulation 6A of the ABWOR regulations to a person who appears from custody is also entitled to provide ABWOR for the purposes of a continuation without plea.

In both circumstances, where this procedure is adopted, the solicitor will be paid the full fee prescribed by Schedule 1B. The relevant case disposal fees for criminal legal aid and ABWOR in the sheriff court are the same, £485.

IN RESPECT WHEREOF



Solicitor  
44 Drumsheugh Gardens  
EDINBURGH  
Solicitor for the Scottish Legal Aid Board